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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Sacramento)

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THE PEOPLE,  
  
Plaintiff and Respondent,  
  
v.  
  
CHRISTOPHER WALTER SCHANTZ,  
  
Defendant and Appellant.

C062059  
  
(Super. Ct. No.  
09F01183)

Defendant Christopher Walter Schantz pled no contest to unlawful possession of oxycodone for sale. The court granted him three years of formal probation subject to specified terms and conditions, ordered him to pay various fees and fines, and further ordered him to report to the Department of Revenue Recovery for a financial evaluation and recommendation of ability to pay costs associated with the presentence report and monthly probation supervision, and attorney fees.

On appeal, defendant contends (1) the probation condition directing him to stay away from known or reputed drug users and places where drugs are present is unconstitutionally overbroad and vague, (2) the order to pay attorney fees is not supported

by sufficient evidence, and (3) the order to pay the cost of the presentence report and for probation supervision must be stricken because defendant was not advised of his right to an ability-to-pay hearing and because he has no ability to pay.

We will modify the probation condition, remand for further proceedings regarding the payment of attorney fees, and otherwise affirm the judgment.

### **FACTUAL AND PROCEDURAL BACKGROUND<sup>1</sup>**

During a routine vehicle stop, police searched defendant and found a baggie containing four OxyContin pills. A search of defendant's car revealed a bottle containing 45 OxyContin pills, plastic bags, a cellular telephone, and a pay/owe sheet.

Defendant was charged with unlawful possession for sale of oxycodone, a controlled substance (Health & Saf. Code, § 11351-count one), and unlawful transportation of oxycodone (Health & Saf. Code, § 11352, subd. (a)-count two).

Defendant entered a negotiated plea of no contest to count one in exchange for a promise of no immediate state prison, 90 days in county jail, and dismissal of the remaining charge.

The court granted defendant three years of formal probation subject to specified terms and conditions. The court ordered that defendant pay various fees and fines, including a \$20 court security fee (Pen. Code, § 1465.8, subd. (a)(1)) and a \$263.85 main jail booking fee (Gov. Code, § 29550.2), and further

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<sup>1</sup> A detailed recitation of the facts is not necessary for the disposition of this appeal.

ordered that defendant report to the Department of Revenue Recovery for a financial evaluation and recommendation of ability to pay \$702 for the presentence report and \$46 per month for probation supervision, as well as \$508 in attorney fees.

Defendant filed a timely notice of appeal.

## **DISCUSSION**

### **I**

#### **Probation Condition**

One of the conditions of defendant's probation requires that defendant "not associate with known or reputed users or sellers of marijuana, dangerous drugs or narcotics, or be in places where narcotics and/or dangerous drugs are present."<sup>2</sup> Defendant contends the term "known" does not specify that the fact someone is a user or seller of drugs be *known to defendant*, and the condition prohibits defendant from being in any "legitimate" place where drugs or narcotics are present, such as a hospital. We agree.

In *In re Sheena K.* (2007) 40 Cal.4th 875 (*Sheena K.*), the California Supreme Court held that a probationary condition prohibiting the probationer from associating with anyone who is

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<sup>2</sup> The court's minute order dated May 11, 2009, includes the following probation condition, which differs slightly from that contained in the probation report: "Defendant shall not associate with known or reputed users of marijuana, dangerous drugs or narcotics nor be in places where narcotics and/or dangerous drugs are present." However, the court, in pronouncing judgment, incorporated the version contained in the probation report.

a member of a specified class of persons, without a requirement that the probationer know the person is a member of the class, is unconstitutionally vague. (*Id.* at pp. 889-892.) An acceptable remedy when such a condition is challenged on appeal is for the appellate court to insert the knowledge requirement. (*Id.* at p. 892.)

We agree that the condition is unconstitutionally vague as to the term "known," and will modify it to include a knowledge qualifier. Similarly, because the challenged condition, like that in *Sheena K.*, relates also to the places in which defendant may not be, we shall insert the knowledge requirement in that regard as well.

Defendant argues the condition here prohibits him from being at any legitimate location, such as a hospital, where drugs and narcotics would likely be present. We agree and conclude that modification of the condition is required to prevent defendant from being in places where drugs are illegally present.

## II

### **Reimbursement of Attorney Fees**

The trial court ordered defendant to pay the "\$702 pre-sentence [report] cost, \$46 per month probation cost, [and] \$508 attorneys fees[;] each is payable through and reviewable by the court's installment process."<sup>3</sup> The court's minute order

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<sup>3</sup> The probation report contains the following recommendation, which is located below the signature of the report's author:

states: "Defendant shall report to the Department of Revenue Recovery for a financial evaluation and recommendation of ability to pay costs for and in the amount of \$702.00 for the presentence report and \$46.00 per month for probation supervision, payable through the Court's installments process."

The court's minute order further states: "Attorney Fees ordered \$508.00 payable thru DRR. [¶] Defendant pay through the Court's installments process the amount determined after an evaluation and recommendation of ability to pay and for development of a payment schedule for court-ordered costs, fees, fines and restitution . . . ."

Defendant contends there is insufficient evidence to support the court's order to pay \$508 for attorney fees.

Respondent argues defendant forfeited his claim by failing to raise it at trial (*People v. Whisenand* (1995) 37 Cal.App.4th 1383, 1395), that the claim is not properly brought on an appeal from the judgment and sentence, that the trial court properly adhered to the requirements of Penal Code section 987.8 by ordering defendant to report to the Department of Revenue and Recovery, and that, in any event, defendant does indeed have the ability to pay.

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"If there are reimbursable costs to the County in the disposition of this case for appointed counsel, presentence investigation, probation supervision or incarceration, it is recommended the defendant be ordered to report to the Department of Revenue Recovery for a financial evaluation and recommendation of ability to pay said costs. [¶] Cost of investigation and presentence report \$702.00; monthly cost of probation \$46.00, cost of urinalysis testing \$25.00 per test."

Preliminarily, we reject respondent's argument that defendant has forfeited his claim by failing to raise it in the trial court. We agree with the court in *People v. Viray* (2005) 134 Cal.App.4th 1186 (*Viray*) that a forfeiture cannot "properly be predicated on the failure of [defense counsel] to challenge an order concerning *his own fees*," given the "patent conflict of interest" (*id.* at p. 1215).

Turning to the merits, with respect to attorney fees, Penal Code section 987.8, subdivision (b) provides that after notice and a hearing, "the court may . . . make a determination of the present ability of the defendant to pay all or a portion of the cost" of court appointed counsel and "may, in its discretion, order the defendant to appear before a county officer designated by the court to make an inquiry into the ability of the defendant to pay all or a portion of [that cost]."

"[P]roceedings [under Penal Code section 987.8] to assess attorney's fees against a criminal defendant involve the taking of property, and therefore require due process of law, including notice and a hearing [this hearing may take place at the sentencing hearing].'" [Citation.] . . . Under the statute, a court may order a defendant, who has the ability to pay, to reimburse the county for the costs of legal representation. However, the defendant must be given notice and afforded specific procedural rights, including the right to present witnesses at the hearing and to confront and cross-examine adverse witnesses. [Citations.] The statute also requires the court to advise a defendant—prior to the furnishing of legal

counsel-of his potential liability for the costs of court-appointed counsel. (§ 987.[8], subd. (f).)" (*People v. Phillips* (1994) 25 Cal.App.4th 62, 72-73 (*Phillips*)).

Here, the trial court concluded that the attorney fees would be imposed in the amount of \$508 and directed defendant to go to the Department of Revenue Recovery, which was in accordance with the recommendation contained in the probation report that he be ordered to report to that agency "for a financial evaluation and recommendation of [his] ability to pay said costs." The record confirms defendant was given adequate notice of the reimbursement of attorney fees by virtue of the probation report. (*Phillips, supra*, 25 Cal.App.4th at pp. 66, 73-75 [concluding that a probation report that recommended the defendant pay attorney fees (if appropriate) "constituted notice reasonably calculated, under all of the circumstances, to apprise defendant that the matter would be taken up in the context of the sentencing hearing"].) However, the record does not show that defendant was given an opportunity to challenge the amount of reimbursement ordered, and there is no evidence in the record supporting the amount. The trial court simply said, "I'm gonna assess you court costs of . . . \$508 attorneys fees . . . payable through and reviewable by the court's installment process." The probation report, while addressing the potential for reimbursable costs "for appointed counsel," says nothing about the amount, nor was evidence offered at the hearing to support the amount. Here, as in *Viray*, the amount of the reimbursement order "is entirely unsupported by evidence"

and has been "allowed without opposition." (*Viray, supra*, 134 Cal.App.4th at p. 1217.) Therefore, we must reverse the order and remand this matter to the trial court to determine whether to receive evidence to support the amount or abandon reimbursement of attorney fees altogether. (See *Viray, supra*, 134 Cal.App.4th at pp. 1217-1219; see also *Phillips, supra*, 25 Cal.App.4th at p. 76 [noting that the purpose of Penal Code section 987.8 is "to conserve the public fisc," and that requiring separate hearings under that section would simply cost "additional public funds"].)

### III

#### **Reimbursement of Costs of Presentence Report and Probation Supervision**

The probation report recommended a "[c]ost of investigation and presentence report" of \$702.00, and a "monthly cost of probation" of \$46.00. At the sentencing hearing, the trial court ordered defendant to pay "\$702 pre-sentence [report] cost, \$46 per month probation cost . . . [;] each is payable through and reviewable by the court's installment process." The court's minute order states: "Defendant shall report to the Department of Revenue Recovery for a financial evaluation and recommendation of ability to pay costs for and in the amount of \$702.00 for the presentence report and \$46.00 per month for probation supervision, payable through the Court's installments process."

Defendant claims the trial court never advised him of his right to a hearing regarding his ability to pay the cost of



preparing the probation report and the monthly probation supervision costs. In any event, he urges, he has no ability to pay those costs.

When probation costs are generated by a criminal conviction, "[t]he court shall order the defendant to appear before the probation officer, or his or her authorized representative, to make an inquiry into the ability of the defendant to pay all or a portion of these costs," and the probation officer must inform the defendant of his or her right to a hearing on his or her ability to pay and the payment amount. (Pen. Code, § 1203.1b, subd. (a).) If the defendant does not waive this right, the matter must be referred to the court for a hearing. (Pen. Code, § 1203.1b, subd. (b).)

Defendant failed to object in the trial court and is therefore deemed to have forfeited his claim regarding probation costs for purposes of appeal. (*People v. Valtakis* (2003) 105 Cal.App.4th 1066, 1072.) In any event, defendant's claim fails on the merits.

Defendant had ample notice of a hearing to determine his ability to pay. The probation report provided notice that reimbursable costs, including probation costs, would be subject to a financial evaluation and recommendation by the Department of Revenue Recovery of defendant's ability to pay. Upon imposition of those costs, the court informed defendant the costs were "payable through *and reviewable by* the court's installment process." (*Italics added.*) The court's minute order directs defendant to "report to the Department of Revenue

Recovery for a financial evaluation and recommendation of ability to pay costs.” Defendant does not provide any evidence, nor can we find any in the record, that the appropriate evaluation has not been, or will not be, conducted by the Department of Revenue Recovery.

While it is the task of the Department of Revenue Recovery to determine defendant’s ability to pay, we note the information in the probation report, as provided by defendant, that defendant is employed as a cashier at a gas station for which he earns \$11 per hour; he is single and supports only himself; and he has no psychological or medical problems that would interfere with his ability to work.<sup>4</sup>

#### **DISPOSITION**

Defendant’s conviction is affirmed. The order for payment of \$508 in attorney fees is reversed and the issue remanded to the trial court for further proceedings consistent with this opinion. The probation condition that prohibits defendant from associating with users or sellers of marijuana, dangerous drugs,

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<sup>4</sup> Pursuant to this court’s miscellaneous order No. 2010-002, filed March 16, 2010, we deem defendant to have raised the issue (without additional briefing) of whether amendments to Penal Code section 4019, effective January 25, 2010, apply retroactively to his pending appeal and entitled him to additional presentence credits. As expressed in the recent opinion in *People v. Brown* (2010) 182 Cal.App.4th 1354, we conclude that the amendments do apply to all appeals pending as of January 25, 2010. Although defendant is not among the prisoners excepted from the additional accrual of credit (Pen. Code, § 4019, subds. (b) & (c); Stats. 2009, 3d Ex. Sess., ch. 28, § 50), he is not entitled to additional credit, as he only served one day of presentence custody (Pen. Code, § 4019, subd. (f)).

or narcotics, or from being in places where narcotics and/or dangerous drugs are present, is modified to state: "Defendant shall not associate with people he knows or reasonably should know to be reputed users or sellers of marijuana, dangerous drugs, or narcotics, or be in places where he knows or reasonably should know narcotics and/or dangerous drugs are illegally present." As so modified, the order of probation is affirmed. The trial court is directed to amend its records to reflect this modification and to forward the appropriate documents to defendant and to the probation department.

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RAYE, J.

We concur:

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SIMS, Acting P. J.

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CANTIL-SAKAUYE, J.